

IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket No. 31449

STATE OF IDAHO,	)	
	)	2006 Opinion No. 40
Plaintiff-Respondent,	)	
	)	Filed: June 2, 2006
v.	)	
	)	Stephen W. Kenyon, Clerk
ERIC L. CHRISTIANSEN,	)	
	)	
Defendant-Appellant.	)	
	)	

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Appeal from the District Court of the Second Judicial District, State of Idaho, Nez Perce County. Hon. Carl B. Kerrick, District Judge.

Judgment of conviction for arson and attempted arson, affirmed.

Randall, Blake & Cox, Lewiston, for appellant. Scott M. Chapman argued.

Hon. Lawrence G. Wasden, Attorney General; Courtney E. Beebe, Deputy Attorney General, Boise, for respondent. Courtney E. Beebe argued.

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PERRY, Chief Judge

Eric L. Christiansen appeals the district court's denial of his motion for a new trial after a jury found him guilty of several counts of arson. His motion was based upon two alleged errors at trial: the admission of a detective's testimony that Christiansen had refused to consent to a search of the burned business premises, and the admission of foundational evidence for proffered, but excluded, expert witness testimony that implied that Christiansen had lied to police. We affirm.

I.

BACKGROUND

During early morning hours, a fire occurred inside a party supply store owned by Christiansen. As a result of the fire, Christiansen was charged with two counts of arson and two counts of attempted arson. Idaho Code §§ 18-801, -802, -306. Before trial, Christiansen filed a motion in limine requesting that the state be required to lay the foundation for any expert testimony outside the presence of the jury. The court denied this motion. At trial, a detective

who investigated the fire testified that during interrogation, Christiansen denied setting the fire. The prosecutor then elicited foundational evidence about the detective's training in interviewing suspects and determining truthfulness from an interviewee's demeanor and body language. After this foundational testimony, the prosecutor asked what the detective had noticed about Christiansen's behavior during his interview. Before the detective could respond, Christiansen objected and his objection was sustained.

The same detective also testified that he had asked Christiansen to consent to a search of his business premises, but that Christiansen had refused. After this testimony, Christiansen moved for a mistrial, arguing that the detective's testimony was an impermissible comment on Christiansen's exercise of his constitutional right not to consent to a warrantless search. The court held that the testimony had been improper, but that the error did not require a mistrial.

The jury returned guilty verdicts on all counts. Christiansen thereafter moved for a new trial pursuant to Idaho Criminal Rule 34. The district court denied the motion, holding that the comment about Christiansen's refusal to consent to a search was not prejudicial and that because the court ultimately sustained Christiansen's objection regarding the detective's observations about Christiansen's truthfulness, no inadmissible evidence actually came before the jury. Christiansen now appeals the denial of his motion for a new trial.<sup>1</sup>

## II.

### DISCUSSION

#### A. Standard of Review

When a court has committed an error of law during a trial, a new trial may be ordered if necessary in the interest of justice. I.C. § 19-2406(5); I.C.R. 34; *State v. Cantu*, 129 Idaho 673, 675, 931 P.2d 1191, 1193 (1997); *State v. Davis*, 127 Idaho 62, 65, 896 P.2d 970, 973 (1995). The question whether an error of law occurred is subject to our *de novo* review. *State v. Turner*, 136 Idaho 629, 635, 38 P.3d 1285, 1291 (Ct. App. 2001). Whether an error warrants a new trial,

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<sup>1</sup> Christiansen's motion to the district court also requested, in the alternative, entry of a judgment of acquittal. On appeal, he lists the denial of the motion for a judgment of acquittal as an issue, but he presents no argument that the district court was incorrect in concluding that the state presented sufficient evidence to support the guilty verdict. Further, as will become apparent from our discussion of Christiansen's other claims, there was plainly substantial evidence upon which the finding of guilt could reasonably be based. Therefore, we do not further address the denial of Christiansen's motion for a judgment of acquittal.

however, is a matter within the trial court's discretion, and, on appeal, this Court will not disturb that exercise of discretion, absent a showing of manifest abuse. *State v. Olin*, 103 Idaho 391, 399, 648 P.2d 203, 211 (1982).

**B. The Detective's Foundational Testimony Regarding his Experience Detecting Truthfulness and Lies**

Christiansen first argues that the trial court erred in denying his motion in limine to require the state to lay the foundation for all expert testimony outside the presence of the jury. Due to this error, Christiansen asserts, the prosecutor was improperly permitted to elicit the detective's testimony about his experience discerning the credibility and truthfulness of a suspect. Even though the detective was never allowed to render an opinion that Christiansen was untruthful, Christiansen argues that the foundational testimony and the ultimate question to which Christiansen's objection was sustained effectively informed the jury that the detective was of the opinion that Christiansen exhibited the signs of deception or untruthfulness. The foundational testimony was presented as follows:

Prosecutor: Sergeant Clark, when we left off, I had asked you if you could relate for the jury your training that you've received in the methods of interviewing individuals.

Detective: I've received, from the standpoint of hours, about 60 hours devoted just to interview and interrogation. Probably the best courses that I've had was called the Read technique. . . . And essentially when we're interrogating someone, we attempt to read body language and, of course, put that in the context of what the question is, and what the response is, and then what the body language is. So, we try to determine through all these factors whether a person is being deceptive or truthful.

Prosecutor: What kind of--if I might, we've all heard about tells in poker, where somebody is trying to determine whether somebody is bluffing or not. What kind of tells would you be looking for in a normal interview?

Detective: Well, if someone is telling the truth, they don't have to think about the answer. Typically, the person will lean forward, have an open position and answer--the interviewer will ask the question and it will be--it's not difficult to tell the truth, so the answer will be spontaneous, because the truth just remains the same. Lies or untruths, sometimes we forget what we said a minute ago, so we have to think about things.

Prosecutor: You said an open position?

Detective: Well, leaning forward, palms up, making direct eye contact and giving a complete answer without a lot of stammering and stumbling.

Prosecutor: What kinds of things have you been trained to look for that indicate somebody is being deceptive?

Detective: Well, and we have to be cautious here, because one thing, in and of itself, doesn't necessarily say anything; but several factors put together may be an indicator of deception. Hesitating when questioned, crossing arms, leaning back, looking away when giving an answer to a question, this kind of thing, rubbing lint away from the shoulders, rubbing your eyes, those kind of things strung together are an indicator of deception, is my training and my experience. I've used this for several years now and it--it's accurate, I believe. I mean, I've conducted many, many interrogations using this technique.

Prosecutor: And have you used this technique to come to opinions on whether the person you're talking to is being deceptive or not?

Detective: Yes.

Prosecutor: Referring to this specific interview that we've been discussing, can you tell the jury what kind of things you noticed about the behavior of the defendant?

Christiansen objected before the detective could respond. Although the court ultimately sustained the objection, Christiansen argues that the foundational testimony suggested to the jury that the detective was of the opinion that Christiansen lied during his interview. That opinion should have been excluded, Christiansen argues, because it invaded the province of the jury.

It appears that the state concedes on appeal that this was not an appropriate line of questioning.<sup>2</sup> We nevertheless decline to address this issue, because the trial court sustained the only objection that was made during this line of questioning. Christiansen did not object to any of the foundational questions upon which he now posits error. It is well established that an appellate court will not review an alleged error on appeal unless the record discloses an adverse ruling which forms the basis for the assignment of error. *State v. Barnes*, 133 Idaho 378, 384, 987 P.2d 290, 296 (1999); *State v. Fisher*, 123 Idaho 481, 485, 849 P.2d 942, 946 (1993).

Christiansen contends, however, that the adverse ruling occurred before trial, when the district court denied his motion in limine. That motion requested that the state be required to:

establish, outside the presence of the jury, adequate foundation for opinion/technical evidence pursuant to Rule 702 and 705 of the Idaho Rules of Evidence and to further prevent the state from referring to any said opinion(s) and

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<sup>2</sup> Prior to trial, the prosecutor had successfully opposed Christiansen's motion in limine to allow introduction of evidence that he passed a polygraph test. The prosecutor nevertheless sought introduction of the detective's observations concerning Christiansen's veracity, apparently on the theory that the detective was a more reliable "lie detector" than is a polygraph.

on technical evidence to the jury until the requisite foundational requirements are met.

This vague motion did not identify or describe any anticipated improper evidence. Rather, it broadly requested that the court bar *any* foundational evidence for *any* expert testimony showing a witness's expertise and basis for the expert opinion. Generally, such foundational evidence *should* be placed before the jury to aid the jury in evaluating the weight and credibility to give the testimony. Under these circumstances, the district court did not err in denying Christiansen's broadly-worded motion in limine, and Christiansen has shown no erroneous adverse ruling by which the detective's foundational testimony was permitted at trial. Therefore, the admission of the testimony does not constitute a basis for a new trial under I.C. § 19-2406.

**C. The Detective's Testimony on Christiansen's Refusal to Submit to a Warrantless Search**

Christiansen next contends that the trial court erred when it refused to grant a mistrial and when it later denied Christiansen's motion for a new trial, because the state impermissibly elicited testimony that he had refused to consent to a search of his business.

The detective testified that he confronted Christiansen with the detective's belief that Christiansen's story about the fire was untrue. The prosecutor then asked:

Prosecutor: Did you ask him for consent to search his business?

Detective: I did. I told him that I believed that it would shed some light on motive. If he was financially sound, which he told me he was, then there should be documentation indicating the same, that shows that he's making money; that the business is under no financial stress. And that would shed a lot of light on motive.

Prosecutor: Did he give you permission?

Detective: No, he did not.

Prosecutor: It was his right not to give you permission?

Detective: Correct.

After eliciting this testimony, the prosecutor moved to a question on a different topic. Before the detective could answer the new question, Christiansen moved for a mistrial on the ground that the evidence of his refusal to consent to a search violated his rights under the Fourth Amendment. The court held that the testimony was improper but did not require a mistrial. The court asked if Christiansen wanted a curative instruction to the jury, but Christiansen's counsel declined because he did not want to bring any more attention to the statement. On appeal, Christiansen argues that the prosecutor's use of evidence of Christiansen's refusal to consent to a

search of his business premises and records violated his rights under the Fourth Amendment to the United States Constitution.

The Fourth Amendment prohibition against unreasonable searches and seizures applies not only to residences and automobiles but also to business properties. *Dow Chemical Co. v. United States*, 476 U.S. 227, 235-36 (1986); *State v. Patterson*, 139 Idaho 858, 866, 87 P.3d 967, 975 (Ct. App. 2003); *State v. Chapple*, 124 Idaho 525, 527, 861 P.2d 95, 97 (Ct. App. 1993). Therefore, government officers may not search business premises absent a warrant or circumstances that give rise to an exception to the warrant requirement. An officer who demands entry but presents no warrant presumptively has no right to enter. *Camara v. Municipal Court*, 387 U.S. 523, 528-29 (1967); *United States v. Prescott*, 581 F.2d 1343, 1350-51 (9th Cir. 1978). Consequently, an individual may refuse to consent to a search by police without a warrant. *Id.*; *State v. Benson*, 133 Idaho 152, 160, 983 P.2d 225, 233 (Ct. App. 1999).

The question presented is whether the state may use a defendant's refusal of consent to raise an inference of guilt. This question is one of first impression in Idaho, but other jurisdictions addressing the issue have held that the Fourth Amendment is violated when the government uses such a refusal to impute guilty knowledge to the defendant, although such evidence may be admissible for other purposes. *See United States v. Dozal*, 173 F.3d 787 (10th Cir. 1999) (allowing the evidence when it was elicited not to imply guilt but to establish the defendant's dominion and control of the premises where illegal drugs were found); *United States v. Thame*, 846 F.2d 200, 206-07 (3d Cir. 1988) (finding error where prosecutor argued that the defendant's reliance on his Fourth Amendment rights constituted evidence of his guilt); *Prescott*, 581 F.2d at 1351 (stating, "[I]f the government could use such a refusal against the citizen, an unfair and impermissible burden would be placed upon the assertion of a constitutional right . . ."); *Reeves v. State*, 969 S.W.2d 471, 495 (Tex. Ct. App. 1998) (holding that evidence of a defendant's refusal to consent to entry into her home was error of constitutional magnitude).

Some of these courts have analogized the exercise of Fourth Amendment rights to the exercise of the Fifth Amendment right to remain silent, which has long been held inadmissible for purposes of implying guilt. *See Doyle v. Ohio*, 426 U.S. 610, 617 (1976); *Griffin v. California*, 380 U.S. 609, 613 (1965). As the Ninth Circuit explained:

[U]se by the prosecutor of the refusal of entry, like use of the silence by the prosecutor, can have but one objective--to induce the jury to infer guilt. In the case of the silence, the prosecutor can argue that if the defendant had nothing to

hide, he would not keep silent. In the case of the refusal of entry, the prosecutor can argue that, if the defendant were not trying to hide something or someone . . . she would have let the officer in. In either case, whether the argument is made or not, the desired inference may be well drawn by the jury. This is why the evidence is inadmissible in the case of silence. It is also why the evidence is inadmissible in the case of refusal to let the officer search.

*Prescott*, 581 F.2d at 1352 (citations omitted). See also *State v. Palenkas*, 933 P.2d 1269, 1279 (Ariz. Ct. App. 1996) (no valid distinction between privilege against self-incrimination and the right to be free from warrantless searches that would justify a different rule about inadmissibility as evidence of guilt).

We agree with these authorities and with the district court's decision that the testimony was improper. The prosecutor's only evident purpose in eliciting the testimony was to convey to the jury that Christiansen must have refused permission for a search in order to prevent the police from discovering incriminating evidence, such as a financial motive for the alleged arson.

Unfortunately, Christiansen did not object to the prosecutor's questions eliciting this testimony, but only moved for a mistrial after the damaging testimony came in. Consequently, the state contends that the issue has not been preserved for appeal. The state argues that the motion for mistrial ought not be considered a sufficient basis for appellate review when the defendant had an opportunity to make a timely objection that would have prevented admission of the evidence. We do not resolve this question of whether a motion for a mistrial in this circumstance is sufficient to preserve an appellate challenge to testimony that came in without objection, because we conclude that the constitutional violation here amounted to fundamental error. Where there has been fundamental error in a criminal case, we will address the error even though no objection was made at trial. *State v. Haggard*, 94 Idaho 249, 251, 486 P.2d 260, 262 (1971).

Error is fundamental if it goes to the foundation or basis of a defendant's rights or goes to the foundation of the case or takes from the defendant a right which was essential to his defense and which no court could or ought to permit him to waive. *State v. Kerchusky*, 138 Idaho 671, 677, 67 P.3d 1283, 1289 (Ct. App. 2003); *State v. Hollon*, 136 Idaho 499, 503, 36 P.3d 1287, 1291 (Ct. App. 2001); *State v. Lovelass*, 133 Idaho 160, 165, 983 P.2d 233, 238 (Ct. App. 1999); *State v. Prelwitz*, 132 Idaho 191, 193, 968 P.2d 1100, 1102 (Ct. App. 1998). Where a constitutional error is of such significance as to implicate the fundamental error doctrine, the doctrine "serves to restrain prosecuting attorneys from violating defendants' constitutional rights

by presenting unconstitutionally obtained evidence in the absence of objection by defense attorneys or *sua sponte* exclusion by trial courts.” *Kerchusky*, 138 Idaho at 678, 67 P.3d at 1290.

The appellate courts of this state have consistently held that reference to a defendant’s exercise of the right to remain silent during custodial interrogation is fundamental error subject to appellate review despite the absence of an objection in the trial court. *State v. Dougherty*, 142 Idaho 1, 4, 121 P.3d 416, 419 (Ct. App. 2005); *Kerchusky*, 138 Idaho at 678, 67 P.3d at 1290; *State v. Poland*, 116 Idaho 34, 36, 773 P.2d 651, 653 (Ct. App. 1989). We have reasoned that the risk that a finding of guilt was based on a violation of the United States and Idaho Constitutions warrants such a review. *Id.*; *State v. White*, 97 Idaho 708, 714-15, 551 P.2d 1344, 1350-51 (1976). We have applied the fundamental error doctrine not only to a defendant’s post-*Miranda*<sup>3</sup> silence, where it has been said that prosecutorial use of a defendant’s silence is of special concern because silence may indicate nothing more than reliance on the *Miranda* warning’s implicit representation that silence will not carry a penalty, but also to the individual’s silence *before Miranda* warnings were given. *State v. Moore*, 131 Idaho 814, 965 P.2d 174 (1998); *Kerchusky*, 138 Idaho at 678, 67 P.3d at 1290. We have taken this view because regardless of the government’s actions, “[t]he constitutional right is always present.” *Moore*, 131 Idaho at 821, 965 P.2d at 180.

The Fourth Amendment safeguards are also “always present,” and a finding of guilt based on a violation of those safeguards is as troubling as a finding of guilt stemming from a violation of Fifth Amendment rights. We can discern no appreciable distinction between the exercise of Fourth Amendment rights and Fifth Amendment rights for the purposes of fundamental error analysis. We therefore hold that a claim that the state sought to raise an inference of guilt by referring to a defendant’s refusal to consent to a warrantless search constitutes fundamental error. The issue is thus reviewable on this appeal despite the lack of a timely objection below.

Our final query is whether the error in this case was harmless, for error does not require reversal of a conviction unless it is prejudicial. I.C.R. 52; *State v. Stoddard*, 105 Idaho 169, 171, 667 P.2d 272, 274 (Ct. App. 1983). Even error that is fundamental may be harmless in the context of the entire trial. *Poland*, 116 Idaho at 37, 773 P.2d at 654; *State v. Rutherford*, 107

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<sup>3</sup> *Miranda v. Arizona*, 384 U.S. 436 (1966).

Idaho 910, 916, 693 P.2d 1112, 1118 (Ct. App. 1985). “The test for harmless error . . . is whether a reviewing court can find beyond a reasonable doubt that the jury would have reached the same result without the admission of the challenged evidence.” *Moore*, 131 Idaho at 821, 965 P.2d at 181; *State v. Slater*, 136 Idaho 293, 300, 32 P.3d 685, 692 (Ct. App. 2001).

The state’s theory was that Christiansen attempted to burn his business and collect fire insurance because he was having financial difficulties, a contention that it supported with evidence that Christiansen was facing several significant unexpected costs and that he had recently increased the insurance coverage on his business. The state also presented strong evidence that the fire had been intentionally caused, for several fire investigators testified that the fire started in two separate locations and had moved through the building by following a trail created by stacks of papers. Although the investigators could not conclusively say whether an accelerant was used, the state showed that Christiansen had brought a container of airplane fuel into the store. The prosecutor also noted with suspicion that Christiansen was already present at the scene when firefighters arrived at approximately three o’clock in the morning.

Christiansen countered with a version of events that was plausible, although premised on a number of coincidences and the testimony of individuals who might have been biased in his favor. Christiansen testified that the evening preceding the fire, he placed documents on the floor not to make a path for a fire to follow, but as a prelude to reorganizing his business files. He said he had been burning a candle, as was his habit when working after business hours, and had returned to the store in the early morning because he awakened at home with the abrupt fear that he had not extinguished the candle. This story was corroborated by his girlfriend. Although fire investigators said that the fire had not started at the candle, Christiansen presented anecdotal evidence from his mother that this brand of candle occasionally shot sparks for some distance. He also noted that firefighters had found that the back door to the business was open, and that fire investigators had not checked the electrical outlet behind a radio, suggesting the possibility of an outside arsonist or alternate accidental source. Christiansen explained the presence of the airplane fuel by saying that he had purchased it to power his modified high performance snowmobile and had brought it into the store to prevent it from being stolen out of the back of his truck. Christiansen also presented testimony from his accountant, who said that the state had overstated Christiansen’s financial straits, and Christiansen’s insurance agent, a friend of twenty-five years duration, testified that Christiansen’s insurance coverage was increased at the agent’s

urging as part of a routine reevaluation of the business assets. The thrust of Christiansen's defense was that the suspicious circumstances suggesting his guilt could be innocently explained and that he was the victim of mysterious and unfortunate events.

At the time Christiansen refused the search, he was being interrogated by police, who told him that the physical evidence showed that arson had occurred and that he was their primary suspect. The police implied that if he was financially sound, as he claimed to be, then a search would exonerate him by showing that he did not have a motive for arson. In these circumstances, a jury might wonder why, if he was indeed innocent, he did not welcome the opportunity to eliminate himself as a suspect and help the police find the actual perpetrator, but instead excluded police. Nevertheless, we see no reasonable possibility that the jury would have acquitted Christiansen without this evidence, for the testimony of Christiansen's accountant negated the implication of a financial motive. She testified that the business was showing a net profit. In view of the accountant's testimony, the jury logically would have recognized that Christiansen's refusal was not an attempt to cover up a motive.

Moreover, there was overwhelming evidence of Christiansen's guilt. His defense lacked credibility, for it required crediting a line of coincidences and relying on the testimony of people who had considerable incentive to lie--Christiansen's mother, his girlfriend, a childhood friend who was his insurance agent, and Christiansen himself. Christiansen did not challenge the opinions of several disinterested fire investigators, who testified conclusively that the fire had not started from the purported accidental source, the candle, but from two other locations within the store that did not bear the hallmarks of accidental ignition. The consent issue has no bearing on this evidence. For these reasons, we cannot say that the state's unconstitutional commentary on Christiansen's refusal to consent to a search amounted to reversible error.

#### **IV.**

#### **CONCLUSION**

We hold that the testimony regarding Christiansen's choice to exercise his constitutional right to refuse to consent to a warrantless search was a fundamental error. Because of the overwhelming evidence of guilt, however, we hold that the error was harmless. The judgment of conviction is affirmed.

Judge GUTIERREZ **CONCURS.**

Judge LANSING, **DISSENTING**

I am in full accord with the majority opinion except its conclusion that the error was harmless when the state presented evidence violating Christiansen's Fourth Amendment right to refuse consent to a warrantless search. I would vacate the judgment of conviction and remand for a new trial.

Christiansen presented a plausible defense, supported by the testimony of several witnesses. All of the evidence against him was circumstantial. That evidence is not overwhelming, particularly in view of Christiansen's explanations for the suspicious circumstances.

According to the State's evidence, when Christiansen disallowed the search, he was being interrogated by police who had told him that the physical evidence showed that arson had occurred and that he was their primary suspect. The officer's trial testimony implied that if Christiansen was financially sound, as he claimed to be, then a search could have exonerated him by showing that he did not have a motive for arson. Thus the State used evidence that Christiansen had exercised a constitutional right in order to attack his defense and undermine his credibility. Given Christiansen's defense that he was an innocent victim of an accidental fire or arson by a third party, his refusal to consent to a search could have appeared extremely suspect to jurors.

I believe that the jury might otherwise have found the evidence insufficient to convict Christiansen. Although, as the majority points out, Christiansen's defense required "crediting a line of coincidences," the coincidences are not so far-fetched or implausible as to lack believability. And acceptance of Christiansen's defense would not have required that the jury reject the fire investigators' opinions that the fire was an arson rather than an accident caused by a candle. Christiansen's testimony regarding the candle that he left burning explained his presence at the business premises in the early morning hours when firefighters arrived, regardless of whether the candle was the source of the fire.

Of particular importance was the testimony of Christiansen's accountant that the business was not in financial trouble. Although the majority opinion describes the accountant's testimony as neutralizing the harm caused by the inadmissible evidence of Christiansen's refusal of a search, I see the interplay of the two pieces of evidence in a different light. The accountant's testimony seems to eliminate any motive for Christiansen to have burned his own business

premises; and without a motive, the jury might have found the State's circumstantial case insufficient to prove guilt. In my view, the impermissible testimony that Christiansen would not allow a search may have undermined the impact of his accountant's testimony rather than vice versa.

Looking at the totality of the evidence, I cannot say beyond a reasonable doubt that the jury would still have found Christiansen guilty if it had not heard the inadmissible evidence of his refusal to consent to a search. The prosecutor's error can be remedied only by a new trial, and I would therefore vacate the judgment of conviction.